84-1336

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CHARLES E. KERN
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BERNARD J. PANETTA, II
521 Texas Avenue
El Paso, Texas 79901
(915) 544-0042
ATTORNEY FOR PETITIONER

El Paso Graphics Group, 2000 Wyoming, El Paso, Tex. (915) 533-2100

25PP

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QUESTIONS PRESENTED

1. Whether Section 1512(a) of Title 18 United States Code is void for vagueness and overbreadth in violation of the First and Fifth Amendments to the United States Constitution in that it does not give fair notice as to what conduct is proscribed and in that it makes innocent or constitutionally protected conduct criminal.

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Petitioner, CHARLES E. KERN, petitions for a writ of certiorari to review the judgment of the United States Court Of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, pp. A-1-A-14) was an unreported per curiam opinion. There was no opinion issued by the District Court.

JURISDICTION

The opinion of the Court of Appeals was entered on December 21, 1984 (Appendix A, pp.A-1 - A-12). The Court of Appeals denied the application for panel rehearing on February 1, 1985 (Appendix B, p.1). This Court has jurisdiction to consider this case under Section 1254(1) of Title 28, *United States Code*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides for "freedom of speech ... and assembly ..." The Fifth Amendment provides in part as follows: "No person shall ... be deprived of life, liberty, or property, without due process of law..."

STATEMENT OF THE CASE

1. Petitioner, CHARLES E. KERN, and co-defendant LONNIE WIEMERS, two United States Border Patrolmen, were indicted jointly for depriving an individual of his civil rights by assaulting him under color of law in violation of Section 242 of Title 18 *United States Code*, (Count 1), conspiring to intimidate a witness, and the substantive offense of intimidating a witness, in violation of Sections 371 or 1512(a) (1) of Title 18 United States Code (Counts 2 and 3).

They were acquitted by a jury of Counts 1 and 2 but convicted of Count 3. Thereafter, they appealed challenging the sufficiency of the evidence presented by the government regarding Count 3, the substantive offense of intimidating a witness, as well as the constitutionality of the statute, Section 1512 of Title 18 *United States Code*. Mr. WIEMER'S conviction was reversed. Petitioner's conviction was affirmed.

2. In affirming the conviction, the Court of Appeals held that the statute was constitutional.

3. The statute in question reads in pertinent part: "Whoever knowingly uses intimidation ... or attempts to do so ... with intent to influence the testimony of any person in an official proceeding. ..."

The statute does not define intimidation. The Judge defined intimidation as follows: "The term 'intimidation' means to make timid or fearful, to inspire or affect with fear, or to deter as by threats."

The problem with the statute, however, even with the aid of the Court's definition, is that it leaves open

the question — upon whose sensitivity does a violation depend.

4. The Federal Court here had jurisdiction to hear the case by virtue of a Federal indictment alleging the violations of Section 1512(a) (1) of Title 18, *United States Code*.

REASONS FOR GRANTING THE WRIT

This case presents the question of the constitutionality of Section 1512 of Title 18, *United States Code*.

It is beyond dispute that a statute is void for vagueness under the due process clause if it fails to draw reasonably clear lines between lawful and unlawful conduct. *Smith* v. *Goguen*, 415 U.S. 566, 574-78 (1974). Vague statutes fail to provide citizens with fair notice as to what they can or cannot do or say.

The difficulty with a vague statute, however, extends beyond lack of notice. The lack of a standard in a criminal statute gives police officers, prosecutors, and the triers of fact unfettered discretion to apply the law, and thus there is a danger of arbitrary and discriminatory enforcement.

This Court recently defined the void-for-vagueness doctrine as follows:

> As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine-

> the requirement that a legislature establish minimal guidelines to govern law enforcement.' Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'

Kolender v. Lawson, ___ U.S. ___, ___, 103 S. Ct. 1855, 1859-59 (1983.

Moreover, when a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness "demands a greater degree of specificity than in other contexts." *Smith v. Goguen*, 415 U.S. at 573.

In *Coates v. Cincinnati*, 402 U.S. 611 (1971), this Court struck down a city ordinance making it a criminal offense for three or more individuals to assemble on public sidewalks and conduct themselves in a manner which might annoy passersby.

First, this Court recognized that some vagueness inheres in the word annoy:

> Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.

402 U.S. at 614

Second, neither the ordinance nor the Ohio Supreme Court indicated "upon whose sensitivity a violation does depend — the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man." 402 U.S. at 613. The inherent vagueness in attempting to define what annoys people and the failure to specify whose sensitivities are relevant compelled the Court to conclude that the ordinance was vague.

The statute in question here suffers from like infirmities. What is intimidating to some may not be intimidating to others. There is nothing in the statute to indicate to one person what he can or cannot say to another person regarding an investigation about one or both of them.

Accordingly, Petitioner submits that because of the inherent vagueness of the term intimidate, as well as the lack of a determinate standard, the statute should be held to be violative of the due process clause.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ Of Certiorari should be granted.

Respectfully submitted,

CABALLERO, WIEDERSTEIN & PANETTA
521 Texas Avenue
El Paso, Texas 79901
(915) 544-0042

BY: _____
BERNARD J. PANETTA, II
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 84-1131

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

LONNIE D. WIEMERS and CHARLES E. KERN,
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(December 21, 1984)

Before GARZA, JOLLY, and DAVIS, Circuit Judges.

PER CURIAM:*

INTRODUCTION

Lonnie D. Wiemers and Charles Kern were charged in a three-count indictment with (1) depriving Jorge Dominguez of his civil rights by assaulting him under color of law in violation of 18 U.S.C. § 242; (2) conspiring to intimidate David O. Offutt, a witness

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless

expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

in a federal grand jury proceeding, in violation of 18 U.S.C. §§ 371, 1512(a)(1); and (3) knowingly intimidating and attempting to intimidate, and aiding and abetting one another in intimidating David O. Offutt, in violation of 18 U.S.C. §§ 2, 1512(a)(1). The jury acquitted Wiemers and Kern on the first two counts, but returned a guilty verdict on the substantive intimidation count. Assigned as grounds for reversal are (1) insufficiency of the evidence; (2) prosecutorial misconduct occurring during the grand jury proceeding; (3) the trial court's refusal to grant defendants' motion for production of grand jury minutes; and (4) the constitutionality of the statute under which the defendants were convicted. We affirm the conviction of Kern but conclude that the evidence is insufficient to support Wiemer's conviction, which is reversed.

BACKGROUND

In April 1983, Charles Kern, Lonnie E. Wiemers, and David O. Offutt were all employed as United States Border Patrol agents in El Paso, Texas. On April 18, 1983, Jorge Dominguez, who was then twelve years old and a legal resident of the United States, was chased and beaten by two men he believed to be Border Patrol agents. Wiemers and Kern were working as a team at the time Jorge was assaulted; Offutt was also on duty at the time.

On the same evening that Dominguez was assaulted, Wiemers met Offutt at the Paso del Norte

Processing Center in El Paso. Offutt would later testify that Wiemers wanted to tell him something in private, so the two of them stepped outside and Wiemers said, "Don't think Border Patrol agents aren't in good shape," and indicated that either he or Kern had "chased a guy for four blocks and caught him and kicked him and that the guy turned out to be a citizen."

Wiemers and Offutt were close friends and on April 21 Wiemers showed up at Offutt's house. They discussed newspaper reports of the Dominguez assault, and Wiemers told Offutt, "Remember, you don't know anything about it." Offutt later testified that he "was not placed in fear of Mr. Wiemers from this meeting." On April 26, Offutt was called into the Border Patrol's Office of Professional Responsibility and questioned about the Dominguez assault. Offutt did not mention his conversation with Wiemers. Several days later, however, Offutt had a change of heart and decided to tell the Office of Professional Responsibility what he knew. A second interview was conducted during which Offutt implicated Wiemers and Kern.

By early May, a grand jury was investigating the Dominguez assault. Offutt was scheduled to testify before the grand jury on May 3. On May 1, Wiemers and Kern appeared at Offutt's house. In the conversation that followed Kern became irate, threatened to sue the government, and told Offutt, '"You know us, we might kick the hell out of a twenty-four-year-old, but not a twelve-year-old.'" According to Offutt, Wiemers on this occasion "was kind of choked up a little bit. He didn't say too much." Offutt testified that he was "a little bit intimidated" by Kern's conduct during this

conversation. Offutt did not testify that Wiemers did or said anything to put him in fear. On the evening of May 3, 1983, after Offutt had testified, Wiemers showed up at Offutt's home. Offutt candidly admitted that he had implicated Wiemers and Kern in his grand jury testimony. Offutt testified that "Lonnie [Wiemers] got pretty emotional about it. He was choked up." Although the evidence reflects that Wiemers was upset and emotional, there is no indication that he threatened Offutt.

On July 1, 1983, Offutt entered the equipment room at the border patrol station. Kern was seated at a nearby desk speaking on the telephone. When he saw Offutt enter the room, he threw down the telephone and followed Offutt into the equipment room. An argument ensued in which Kern called Offutt a liar and accused him of "wearing a wire." Offutt told Kern, "'... you're going to get just what you got coming, and I'm going to help you,'" to which Kern responded, "So are you." At this point a senior Border Patrol agent entered and told Offutt to leave the room. At trial, Offutt described Kern's demeanor at this time as "threatening."

Beginning in July, and continuing through August 1983, Offutt began finding the phrase "Fink Offutt" stamped (with a rubber stamp) and written on papers, memoranda, and cards at various places around the office. A clerk from a local print shop testified that in late July Kern placed an order for a stamp reading "Fink Offutt." Kern was accompanied by an unidentified man at the time the order was placed. Several Border Patrol agents testified that they had seen "Fink Offutt" stamped on papers or cards in public areas

(such as on the office bulletin board).

Sometime during August, Offutt requested a temporary assignment to the Ysleta Border Patrol Station, which is also located in the El Paso area, because the situation at his former station had become unbearable. Barbara Tullius, Offutt's sister-in-law, testified that she drove by the Ysleta station on the morning of the day before Offutt was to begin working there. As she drove by she noticed a sign on which had been painted the words "Fink Offutt." The sign was subsequently removed before Offutt began working at the Ysleta station. Offutt testified that he did not learn about the sign until several weeks later.

Offutt was scheduled to appear before the grand jury for a second time on September 6, 1983. On September 1, he met with the government attorney who prosecuted the case to discuss his upcoming testimony. As he neared home, he spotted Wiemers and Kern driving past. Offutt's house was located on a major street near the elementary school that Kern's daughter attended. Although Kern and Wiemers were aware of Offutt's presence, no threatening gestures were made. On the same day, Offutt filed for a transfer outside of the El Paso area. When asked why he had requested the transfer, Offutt stated: "I had just gotten tired of their harassment, the intimidation, the 'Fink' stamps." But I think the straw that broke the camel's back is (sic) when I came home and they were out in front of the house and it upset my wife that the kids had been playing out there." Offutt received a transfer to a position in Idaho, leaving his and his wife's extended families in the El Paso area.

DISCUSSION

Appellants' primary argument on appeal is that the evidence is insufficient to support their convictions under count three of the indictment. Our analysis of this contention is controlled by well-established rules of appellate review. "The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." **Glasser v. United States,** 315 U.S. 60, 80, 62 S. Ct. 457, 469, 86 L.Ed. 680, 704 (1942). We will affirm "provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." **United States v. Bell,** 678 F.2d 547, 549 (5th Cir. 1982) (en banc), **aff'd,** ____ U.S. ____, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). All credibility choices and reasonable inferences supporting the jury's verdict are indulged in. **United States v. Gant,** 691 F.2d 1159, 1161 (5th Cir. 1982). The same standard of review obtains whether the evidence is direct or circumstantial. **Bell,** 678 F.2d at 549 n. 3.

In this case, to show a violation of 18 U.S.C.§ 1512(a)(1)[1] the government was required to prove that Wiemers and Kern(1) knowingly intimidated or attempted to intimidate David Offutt (2) with the intent to influence his grand jury testimony. We are persuaded that the record supports the view that Kern engaged in conduct prior to Offutt's second appearance before the grand jury on September 6, 1983, from which the jury could have found or inferred these elements. We are also persuaded that evidence against Wiemers is insufficient to sustain his conviction.

Kern attempts to characterize his conduct as innocuous, and perhaps harassing, but not intimidating. He contends that no reasonable person could have been intimidated by his actions. We cannot agree. Kern, accompanied by Wiemers, came to Offutt's house on May 3, 1983, questioned him abut his first appearance before the grand jury, became irate about the investigation, and told Offutt, "'You know us, we might kick the hell out of a twenty-four-year-old, but not a twelve-year-old.'" In another conversation on July 1, in response to Offutt's statement that Kern was going to get just what he had coming, Kern threatened Offutt by replying, "'So are you.'" The evidence also showed that Kern was responsible for ordering the "Fink Offutt" stamp. The jury could reasonably infer from this that Kern was the one who stamped "Fink Offutt" on documents and cards later found in Offutt's mail drawer and in public areas around the Border

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[1] § 1512. **Tampering with a witness, victim, or an informant.**

(a) Whoever knowingly uses intimidation or physical force, or threatens another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to—

(1) influence the testimony of any person in an official proceeding; ... shall be fined not more than $250,000 or imprisoned not more than ten years or both.

Patrol station. Similarly, from Kern's initiation of the "Fink Offutt" campaign, the jury could have inferred some involvement with the "Fink Offutt" sign which was placed at the Ysleta station the day before Offutt was to begin working there. This course of conduct could be reasonably construed as intimidating.[2] More-

over, the jury could have reasonably inferred that this conduct was knowingly engaged in with the intent to influence Offutt's grand jury testimony.

Wiemers' contact with Offutt as summarized above and construed in the light most favorable to the government establishes nothing more than an attempt by Wiemers to implore his personal friend to keep silent regarding Wiemers' possible involvement in a crime. Offutt repeatedly testified that Wiemers neither did nor said anything to intimidate him. Thus, evidence was not presented which will support Wiemers' conviction as a principal in the crime charged.

Although Offutt was intimated by Kern's conduct at the meeting of the three parties on May 1, we are persuaded that neither Wiemers' presence at that meeting nor his presence with Kern in the truck on September 1, is sufficient to sustain a conviction of Wiemers as an aider and abettor of Kern. To support such a conviction, the government must establish that Wiemers "willfully associate[d] himself with the criminal venture and willfully participate[d] in it as he would in something he wished to bring about." **United States v. Freeze,** 707 F.2d 132, 137 (5th Cir. 1983) (quoting **United States v. Pozos,** 697 F.2d 1238, 1242 (5th Cir. 1983)).

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[2]It cannot be disputed that Offutt was intimidated by the events occurring in the several months preceeding his second appearance before the grand jury on September 6. The evidence showed that during this period Offutt called home frequently to check on his wife and children, kept a loaded gun in his home, kept the family dog indoors, and in September 1983, withdrew his son from public school. Additionally, he testified that he was

intimidated by the course of events taken as a whole.

> To prove association, there must be evidence to establish that the defendant "shared in the criminal intent of the principal." **United States v. Smith,** 546 F.2d 1275 (5th Cir. 1977). To prove participation, there must be evidence to establish that the defendant engaged in some affirmative conduct; that is, there must be evidence that defendant committed an overt act designed to aid in the success of the venture. Proof of mere negative acquiescence will not suffice. **United States v. Martinez,** [555 F.2d 1269 (5th Cir. 1977)]; **United States v. Smith, supra.**

United States v. Longoria, 569 F.2d 422, 425 (5th Cir. 1978).

The record reflects that Kern was at times hostile and aggressive toward Offutt. Wiemers, on the other hand, sought to influence Offutt to remain silent by appealing to Offutt's sympathy and loyalty as a friend. Under these circumstances, Wiemers' presence with Kern at or near Offutt's home, standing alone, is not sufficient to support Wiemers' conviction on the theory that Wiemers aided and abetted Kern. It is well established that "[p]roof that a defendant was merely associated with a criminal, or that [a] defendant was present at the scene of a crime is not, without more, sufficient to sustain a conviction for aiding and abetting a criminal venture." **Longoria,** 569 F.2d at 425. Because of our conclusion that the evidence does not support Wiemers' conviction, it is unecessary to consider his other contentions.

Kern next argues that the trial court erred in failing to dismiss the indictment due to prosecutorial misconduct occurring during and before the grand jury proceedings. He contends that the prosecutor was biased against him and that the prosecutor permitted or

encouraged testimony which served no function but to inflame the grand jury. Portions of the grand jury minutes were released by the trial court at the request of the defendants. During his grand jury testimony, Offutt discussed an occasion on which he had worked with Kern. Offutt stated that Kern, while driving a Border Patrol vehicle, had chased a suspected illegal alien and attempted to force the suspect into the line of an oncoming vehicle. Offutt also testified, in response to a question posed by a grand juror, that he had heard rumors that other Border Patrol agents refused to work with Kern, that Kern had been previously investigated for brutality, and that Kern had left his prior job as a police officer "under some sort of cloud." During his second appearance before the grand jury, Offutt was asked if he thought Wiemers and Kern were capable of killing somebody. Offutt responded that he "wouldn't put anything past Charlie Kern." It is also alleged that the prosecutor told defense counsel that Wiemers and Kern were unfit for law enforcement and that the government could "indict anything."

It is the settled law of this circuit that prosecutorial misconduct will not warrant the dismissal of an indictment absent a showing of actual prejudice to the accused. **United States v. McKenzie,** 678 F.2d 629, 631 (5th Cir. 1982), (citing **United States v. Merlino,** 595 F.2d 1016, 1018 (5th Cir. 1979), **cert. denied,** 444 U.S. 1071, 100 S.Ct. 1014, 62 L.Ed. 2d 752 (1980)), **cert. denied,** 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604. Actual prejudice in this context results from conduct which overbears "the will of the grand jury so that the indictment is, in effect, that of the prosecutor rather

than the grand jury." **McKenzie,** 678 F.2d at 631. Moreover, grand jurors are free to act on "tips, rumors, evidence offered by the prosecutor, or their own personal knowledge." **United States v. Dionisio,** 410 U.S. 1, 15, 93 S.Ct. 764, 772, 35 L.Ed.2d 67, 80 (1973). Even assuming the irrelevancy and impropriety of portions of Offutt's grand jury testimony, we do not find that the statements referred to caused actual prejudice to appellant Kern. Similarly, we fail to see how the prosecutor's alleged statements to defense counsel could create the kind of actual prejudice required to warrant dismissal of the indictment.

Kern also argues that the trial court committed reversible error in failing to grant a motion for pretrial production of grand jury minutes (in their entirety). Kern argues that the prosecutor's bias against him was reflected by misconduct occurring outside the presence of the grand jury, and that an examination of the grand jury minutes was the only means of determining the extent of the prosecutor's misconduct before the grand jury. In support of this arguent, Kern refers again to the prosecutor's alleged statements to defense counsel regarding Kern's unfitness for law enforcement and the government's ability to "indict anything." Next, after defense counsel had filed a complaint with the Department of Justice alleging that the prosecutor was biased against the defendants, the prosecutor subpoenaed Wiemers and Kern, and thier attorney to appear before the grand jury in contravention of a Department of Justice policy discouraging prosecutors from issuing subpoenas to targets of grand jury investigations. (These subpoenas were subsequently quashed.) Kern

also contends that the prosecutor attempted to intimate Border Patrol Agent Thomas Poitras in a conversation occurring prior to his grand jury testimony by intimating that he would intertere with Poitras' attempts to transfer to another agency of the federal government if he did not testify favorably to the government.[3]

A trial court has discretion to grant a motion for production of grand jury minutes "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed.R.Crim.P. 6(e)(3)(C)(ii). The Supreme

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[3]The evidence of this allegation is a statement signed by Mr. Poitras. In the statement he indicates that prior to his grand jury testimony, the prosecutor asked questions about other acts of brutality committed by Kern. The prosecutor allegedly prefaced his remarks with the comment "I understand you are trying to leave the [Immigation & Naturalization Service]." In the statement, Poitras states that he believed the prosecutor was attempting to make him change his grand jury testimony.

Court has held that in cases where such a request is made, the burden is on the defendant "to show that 'a particularized need' exists" for production of the minutes. **Pittsburgh Plate Glass Co. v. United States,** 360 U.S. 395, 400, 79 S.Ct. 1237, 1241, 3 L.Ed.2d 1323, 1317 (1959). The trial court found, and we agree, that Kern failed to show such a need. In this case, the occurrences referred to by Kern do not logically lead to the conclusion that any misconduct occurred before the grand jury. These allegations do not establish a "particularized need" for the minutes, nor do they lead to the conclusion that grounds may have existed for a dismissal of the indictment. Such a conclusion is

nothing more than a speculative assertion that some impropriety occurred before the grand jury. **See United States v. Rubin,** 559 F.2d 975, 988 (5th Cir. 1977), **vacated on other grounds,** 439 U.S. 810, 99 S.Ct. 67, 58 L.Ed.2d 102 (1978), **on remand,** 591 F.2d 278 (1979), **cert. denied,** 444 U.S. 864, 100 S.Ct. 133, 62 L.Ed.2d 87. We cannot, thefore, agree with Kern that the trial court abused its discretion in refusing to grant the motion.

Lastly, Kern argues that 18 U.S.C. § 1512(a)(1) is unconstitutionally vague and overbroad. This argument has not been raised in any reported appellate decision.[4] This absence of authority is not surprising given the statute's facial clarity. To avoid being subject to a vagueness attack, a penal statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforecement." **Kolender v. Lawson,** ___ U.S. ___, ___ 103 S.Ct. 1855, 1858, 75 L.Ed. 2d 903, 909 (1983). The notion of intimidation is not so indefinite as to fail to put ordinary people on notice of what conduct is proscribed under section 1512(a)(1).

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[4]The statute was found to pass constitutional muster in a well reasoned opinion by the discourt court in **United States v. Wilson,** 565 F. Supp. 1416, 1429-31 (S.D.N.Y. 1983).

Kern's argument that section 1512(a)(1) is overbroad is similarly without merit. He erroneously argues that the statute prohibits constitutionality protected conduct. This argument overlooks the fact that not all forms of speech and association. **See Chaplinsky v.**

New Hampshire, 315 U.S. 568, 571-72, 62 S.Ct. 766, 769, 86 L.Ed. 1031, 1035 (1942). The only conduct prohibited by the statute is that which directly threatens the intregrity of the judicial process and is constitutionally proscribable.

Accordingly, the judgment of conviction of Kern is AFFIRMED and the conviction of Wiemers is REVERSED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1131

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES E. KERN,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(February 1, 1985)

Before GARZA, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

W. EUGENE DAVIS
United States Circuit Judge

No. 84-1336 (2)

Office - Supreme Court, U.S.
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MAR 20 1985
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES E. KERN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1336

CHARLES E. KERN, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that 18 U.S.C. 1512(a)(1), which prohibits the knowing use of intimidation with intent to influence the testimony of a witness in an official proceeding, is void for vagueness and overbroad in violation of the First and Fifth Amendments to the United States Constitution.

1. Petitioner, a former Border Patrol agent, was convicted of knowingly intimidating and attempting to intimidate a fellow Border Patrol agent with intent to influence his testimony before a federal grand jury, in violation of 18 U.S.C. 1512(a)(1).[1] He was sentenced to 18 months' imprisonment.

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[1]Petitioner and a co-defendant, Lonnie E. Wiemers, were acquitted of charges of deprivation of rights under 18 U.S.C. 242 and of conspiracy to violate 18 U.S.C. 1512(a)(1). Wiemers' conviction for a substantive violation of Section 1512(a)(1) was reversed on appeal for insufficient evidence (Pet. App. A9, A14).

The evidence at trial showed that petitioner, co-defendant Lonnie Wiemers, and David Offutt were employed as Border Patrol agents in El Paso, Texas, when Jorge Dominguez, a twelve-year old boy, was chased and beaten by two men he identified as Border Patrol agents. Wiemers stated to Offutt that he and petitioner were responsible. Offutt appeared before a grand jury investigating the assault on May 3 and September 6, 1983; his testimony implicated Wiemers and petitioner. Pet. App. A2-A3. In a confrontation between Offutt and petitioner in July, Offutt told petitioner "you're going to get just what you got coming, and I'm going to help you" (Pet. App. A4). Petitioner responded "So are you" (*ibid.*). Later that month, petitioner (accompanied by an unidentified man) ordered a rubber stamp reading "Fink Offutt," and in July and August the phrase was stamped on papers in Offutt's mail drawer, around the Border Patrol station, and on the office bulletin board (Pet. App. A4-A5, A7). In August, in order to escape this harassment, Offut requested a temporary transfer to the nearby Ysleta Border Patrol station; shortly before he was to start work there, a "Fink Offutt" sign was posted outside that station. Finally, while driving home after a meeting on September 1 with a government attorney to discuss his grand jury testimony, Offutt observed petitioner and Wiemers in a truck in front of his house. They left as he approached; after he had followed them for a while, they turned around and drove off (Tr. 638-639). This incident led Offutt's wife to fear for their children's safety; because of this and because Offutt "had had all of it I could take" (Tr. 640), he requested and received a transfer to Idaho (Tr. 640-643; Pet. App. A5).

3. At trial, the court instructed the jury on the elements of Section 1512(a)(1) (Tr. 1050):

> In order to establish the offense of intimidation with intent to influence the testimony of a person in an

official proceeding, the Government must prove three essential elements beyond a reasonable doubt:

First, that the Defendants used intimidation or attempted to do so.

Second, that the Defendants acted with intent to influence the testimony of David Offutt with respect to an official proceeding.

And third, that the Defendants acted knowingly and willfully.

The term "intimidation" means to make timid or fearful, to inspire or affect with fear, or to deter as by threats.

2. Petitioner contends that the term "intimidation" in 18 U.S.C. 1512(a)(1) is inherently vague and failed to put him on notice of what conduct was prohibited by the statute. He also asserts that it poses "a danger of arbitrary and discriminatory enforcement" (Pet. 4). The court of appeals, in upholding the constitutionality of the statute, noted "the statute's facial clarity" and held that the "notion of intimidation is not so indefinite as to fail to put ordinary people on notice of what conduct is proscribed" (Pet. App. A13).[2]

The statute under which petitioner was convicted is part of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 *et seq.* The Senate Report indicates that the amendments were intended to "lower[] the threshhold of seriousness for commission of an intimidation offense." S. Rep. 97-532, 97th Cong., 2d Sess. 14 (1982). Concerning Section 1512(a), the Report stated (*id.* at 15):

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[2]The last sentence reproduced at Pet. App. A13 is missing a line of the court of appeals' opinion. The sentence should read:

> This argument overlooks the fact that not all forms of speech and conduct are protected by the constitutional guarantees of freedom of speech and association.

> Current law * * * does not address the most common form of intimidation—verbal harassment. Testimony given to the ABA suggested that sometimes innocent acts, such as telephoning a victim to say hello, coming to his home, or even driving a motorcycle by, may be extremely effective in preventing a victim or witness from testifying. This type of activity is not covered by section 1503 which requires corruption, threats or force for an offense. Section 1510 includes intimidation as a method of obstructing criminal investigations in addition to force, threats, bribery and misrepresentation; however, nowhere is intimidation defined. The Committee believes a clear and straightforward prohibition of such activity will increase prosecution of such cases, where warranted.

The Due Process Clause of the Fifth Amendment requires that a criminal statute "define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983). Section 1512(a)(1) easily meets that standard.

In considering challenges to statutes as unconstitutionally vague, this Court has held that the existence of a scienter requirement as a necessary element of the offense "does much to destroy any force in the argument that application of the [statute] would be so unfair that it must be held invalid." *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 340 (1952).[3] In *Screws* v. *United States*, 325

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[3]The scienter requirement similarly guards against arbitrary and discriminatory enforcement, since the prosecution must persuade the trier of fact that the defendant actually intended the prohibited result.

U.S. 91, 101-102 (1945) (plurality opinion), the Court stated:[4]

> [T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid. * * * [W]here the punishment imposed is only for an act knowingly done with the purpose of doing that which the statute prohibits, the accused cannot be said to suffer from lack of warning or knowledge that the act he does is a violation of law. The requirement that the act must be willful or purposeful may not render certain, for all purposes, a statutory definition of the crime which is in some respects uncertain. But it does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.

Section 1512(a)(1), which makes unlawful the knowing use of, or attempt to use, intimidation with the intent to influence a witness's testimony, contains such a requirement.[5]

Without suggesting that there is any uncertainty respecting the application of the statute to the conduct for which he was convicted, petitioner argues (Pet. 5) that a greater degree of specificity is required of this statute because it is capable of reaching speech and conduct protected by the First Amendment. Cf. *United States* v. *Powell*, 423 U.S.

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[4]This language from the plurality opinion in *Screws* was cited with approval in *Colautti* v. *Franklin*, 439 U.S. 379, 395 n.13 (1979), in which this Court invalidated a state statute that employed an ambiguous term and that lacked a scienter requirement.

[5]The jury instructions, to which petitioner does not object, clearly informed the jury that in order to convict, they had to find that petitioner intended to intimidate Offutt. Thus, unlike *Coates* v. *Cincinnati*, 402 U.S. 611, 613 (1971), upon which petitioner relies (Pet. 5), it is clear in this case that petitioner's conviction was based on the jury's finding about his own intent.

87, 92 (1975); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975). However, as noted above, the statute at issue here is narrowly drawn. The fact that intimidation can be, and often is, accomplished by speech does not, without more, infringe First Amendment rights.[6] In *Watts* v. *United States*, 394 U.S. 705, 707 (1969), this Court held that 18 U.S.C. 871(a), which makes it unlawful "knowingly and willfully" to make a threat against the life of the President of the United States, is constitutional on its face. In so doing, the Court stated (394 U.S. at 707):

> Nevertheless, a statute such as this one, which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech.

The Court there found (*id.* at 708) that the statute requires a true "threat," not mere "political hyperbole." So too in this case, so long as the government has proven intimidation with intent to influence testimony and not merely conversation and association lacking a proven improper purpose, the First Amendment is not implicated.[7]

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[6]Here, of course, petitioner's conduct, which included sitting in his truck in front of Offutt's house while Offutt was away, extended beyond speech.

[7]As the court of appeals noted (Pet. App. A13), the only other decision discussing the constitutionality of Section 1512(a)(1) is *United States* v. *Wilson*, 565 F. Supp. 1416 (S.D.N.Y. 1983). However, as the court in *Wilson* observed (*id.* at 1430), convictions under similar statutes have been upheld although based solely on speech. *E.g.*, *United States* v. *Kelner*, 534 F. 2d 1020 (2d Cir.), cert. denied, 429 U.S. 1022 (1976) (conviction upheld under 18 U.S.C. 875(c), which prohibits transmission in interstate commerce of a communication containing a "threat to injure the person of another"); *United States* v. *Fasolino*, 586 F.2d 939 (2d Cir. 1978) (conviction upheld under 18 U.S.C. 1503, which makes it unlawful, "by threats • • • or by any threatening letter or communication, [to] endeavor[] to influence, intimidate, or impede" officers of the court and jurors).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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